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IN THE

Supreme Court of the United States

October Term, 1967

No. 996

BENJAMIN (BENN) MYZEL, *et al.*,
Petitioners,

v.

HARRY FIELDS,
Respondent.

BENJAMIN (BENN) MYZEL, *et al.*,
Petitioners,

v.

SAMUEL H. KING,
Respondent.

BENJAMIN (BENN) MYZEL, *et al.*,
Petitioners,

v.

RITA VERTELNEY, Special Administratrix, etc.,
Respondent.

BENJAMIN (BENN) MYZEL, *et al.*,
Petitioners.

v.

GORDON M. COHEN,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners submit this Reply Brief in response to the Brief in Opposition of Respondents Fields, King, Vertelney and Cohen.

Respondents' brief in opposition attempts to obscure genuine issues of law by artificially creating factual and

procedural controversies more properly relevant to a brief on the merits. This is particularly illustrated by Respondents' attempt to bury the issue of scienter, which Petitioners believe is vitally important not only in this case but also in almost every action brought under Rule 10b-5.

The district court's instructions clearly did not require a finding of scienter (R. 786-87), thereby permitting recovery based solely on innocent or negligent misstatements or omissions. Petitioners preserved this issue by objecting to the district court's failure to charge the jury on the scienter issue (R. 800, 810, 832, 834).

Respondents contend that Petitioners did not properly present the issue of scienter before the Court of Appeals. This is amply refuted by the fact that the Court of Appeals specifically discussed and decided this issue (A 15, A 19). The Court of Appeals correctly determined that resolution of this issue was required in order to rule upon Petitioners' contentions. Respondents' reliance on *California* v. *Taylor*, 353 U.S. 553, 556 n. 2 (1957), is misplaced. This Court in *Taylor* specifically noted that the Court of Appeals had determined that the issue in question had been waived. In the present action, there was no such finding by the Court of Appeals; instead, the Court of Appeals identified the issue, considered it, and resolved it against Petitioners.

Finally, Respondents also state that "no real and embarrassing conflict exists between courts of appeals." This contention disregards the basic inconsistency between the decision below and *Ellis* v. *Carter*, 291 F. 2d 270 (9th Cir. 1961), on the one hand, and the holding in *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (2d Cir. 1951) that proof of fraud is required in an action under Rule 10b-5, on the

other. No matter how Respondents choose to interpret the holding in *Fischman,* it cannot be reconciled with the standard of absolute liability set forth in the district court's instructions and adopted by the Eighth Circuit. The lower courts have themselves noted the conflict, as pointed out in the Petition, and discussed by Judge Wyatt in *Weber* v. *C.M.P. Corp.,* 242 F. Supp. 321, 324-25 (S.D.N.Y. 1965).

Respondents are attempting to ignore the plain fact that the Court of Appeals has decided an important question of Federal law which has not been settled by this Court. The need for clarification of Rule 10b-5 in both the business and legal community has been reemphasized once again in Barron's (February 19, 1968, p. 5), an important business publication. The confusion among courts of appeals and district courts exists and will not be resolved unless and until this Court decides this issue.

Petitioners need not reiterate the other issues set forth in their Petition. Despite Respondents' attempts to obscure these issues, they are real and vitally important, for both this case and future actions arising under Rule 10b-5. Petitioners therefore respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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